Nos. 83-6381 and 83-1660
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

GILL PARKER, et al.,
Petitioners,
v.
JOHN R. BLOCK, SECRETARY
OF AGRICULTURE, et al.

CHARLES M. ATKINS, COMMISSIONER OF
THE MASSACHUSETTS DEPARTMENT OF
PUBLIC WELFARE,
Petitioner,
v.
GILL PARKER, et al.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE STATE PETITIONER

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This case is before the Court on cross-petitions for a writ of certiorari. This brief will serve as the state respondent's brief in No. 83-6381, as well as the reply in No. 83-1660. The first part of this brief responds to Parker's

claim that certiorari was improvidently granted because of an independent statutory basis for the challenged judgment. The remainder of the brief addresses the remedy issues presented by Parker's petition (No. 83-6381).

SUMMARY OF ARGUMENT

I. This Court properly granted certiorari to review the significant constitutional questions raised by the decisions which held that the notice of a legislative change in the Food Stamp Program did not satisfy the Due Process Clause because of its language, format, and content.

There is no controlling statutory issue which obviates the need for review of this constitutional question. The lower courts' determination that the notice was not adequate under the Food

Stamp Act does not provide an alternate basis for sustaining the judgment below; the opinions themselves, as well as the legislative history of the notice and hearing provision, clearly demonstrate that the statutory and constitutional standards are interwoven.

The language and history of the Act's general notice and hearing provision show that the lower courts wrongly decided this issue. The provision addresses administrative actions to reduce or terminate a particular household's benefits; it does not address across-the-board legislative changes in the program. In any event, the statute is silent as to the form and content of any notice, and instead, leaves such determinations to the Secretary and the states.

The Court may properly review

whatever statutory issue exists in this case. While not stated as a separate question for review, the statutory issue is, nonetheless, fairly included within the constitutional question presented by the Commissioner's petition as well as the remedy questions presented by Parker.

II. The Court of Appeals properly reversed the District Court award of retroactive food stamp benefits to the entire class of 16,000 households. An award of retroactive benefits is unrelated to the finding of an inadequate notice and is not designed to restore the plaintiffs to the position they would have been in had they received a different type of notice; retroactive benefits would be simply a windfall to the plaintiffs.

Congress intended that the restoration of benefits provision of the Food

Stamp Act provide for retroactive benefits if a household has not received its substantive entitlement to food stamp benefits. They are not available where a household, receiving the correct benefit amount, has been denied a procedural protection afforded by the Act.

III. The Court of Appeals also properly reversed the extraordinary permanent injunction entered by the District Court mandating the form and content of future notices and requiring the state to draft regulations for its approval governing the comprehensibility and legibility of notices. The injunction was also inconsistent with Congress' unmistakable intent to leave the determination of the format and content of notices under the Food Stamp Program to the Secretary and the states. A declaration setting forth

the basic requirements for an adequate notice sufficiently protects the rights of food stamp households; the District Court injunction imposed an unwarranted and unnecessary intrusion and burden on the state.

ARGUMENT

I. CERTIORARI WAS NOT IMPROVIDENTLY GRANTED; THIS COURT CAN AND SHOULD REVIEW AND REVERSE THE CONSTITUTIONAL REQUIREMENTS FOR FOOD STAMP NOTICES ANNOUNCED BY THE LOWER COURTS.

After concluding that the Department's December notice announcing a legislative change in the Food Stamp Program was unconstitutional under the Due Process Clause of the Fourteenth Amendment, the Court of Appeals added that, for much the same reasons, the notice did not meet the requirements of the notice and fair hearing provision of the Food Stamp Act,

7 U.S.C. § 2020(e)(10). Parker argues that this limited statutory determination provides an adequate and independent basis for sustaining the judgment below but, because the Commissioner did not specifically include this statutory issue in his questions presented for review, this Court is foreclosed from considering that matter and the dominant constitutional issue involved in this case.[1/] Neither claim is correct.

A. The Food Stamp Act Does Not Provide An Adequate And Independent Basis For Invalidating The December Notice.

Review of the lower courts' suggestion that the December notice violated

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1/ Parker raised these same claims in his brief in opposition to the Commissioner's cross-petition for a writ of certiorari. Brief in Opposition at 1-3.

the notice and fair hearing provision of 7 U.S.C. § 2020(e)(10) reveals that such determination cannot provide an independent basis for the judgment, particularly because the statutory assessment is inextricably interwoven with the constitutional holding.[2/]

2/ The relevant portion of § 2020(e)(10), as amended by Pub. L. No. 95-113, § 1301, 91 Stat. 958, 972, provides:

> "for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency under any provision of its plan of operation as it affects the participation of such household in the food stamp program or by a claim against the household for an overissuance: Provided, That any household which timely requests such a fair hearing after receiving individual notice of agency action, reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits on the basis authorized immediately prior to the notice of adverse action. . ."

The District Court opinion contains no discussion of statutory standards. Instead, it merely notes, without comment, analysis, or legal support, that "[t]he December notice violated the timely advance notice requirements of 7 U.S.C. Section 2020(e)(10) and 7 C.F.R. Section 273.12(e)(2)(ii)." PA. 98.[3/] Similarly, the Court of Appeals, after an elaborate discussion of the Due Process Clause, briefly adds that § 2020(e)(10) requires advance notice.[4/] As to the statutory

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3/ The lower court decisions are reprinted in the Appendix to the Commissioner's Petition for a Writ of Certiorari which is referred to as "PA." The Joint Appendix is referred to as "JA."

4/ It remains unclear from the Court of Appeals opinion whether it actually found the December notice to be untimely. PA. 29-31. The notice was mailed on December

(footnote continued)

requirement for the notice's content, the court relied solely upon the constitutional analysis and inferred a congressional intent not to create an unconstitutional notice provision:

> The district court found the December notice unconstitutional because the notice failed to convey meaningful information to affected recipients. We believe the notice failed to satisfy statutory requirements for the same reason -- the notice in question failed to inform recipients. We doubt that Congress intended a constitutionally deficient notice to satisfy the statutory notice requirement and thus we affirm the district court conclusion that the December

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(footnote continued)

24, 1981, well in advance of the effective date of the reduction and provided households ample opportunity (13 days) to appeal and thereby continue to receive their higher benefits. PA. 47, 49. Any argument that this was not advance notice is untenable, particularly as the timing of the December notice exceeds even the 10-day advance notice required of individual adverse actions. Cf. 7 C.F.R. § 273.13.

> notice failed to satisfy the [statutory] notice requirements. . . . PA. 31.

Contrary to Parker's claim (Brief at 19), there is no further discussion of the statute's language and structure as it relates to the content of notices. The only case relied upon by the Court of Appeals for this statutory holding is Philadelphia Welfare Rights Organization v. O'Bannon, 525 F. Supp. 1055 (E.D. Pa. 1981), which found Pennsylvania's mass change notice invalid only on due process grounds. Consequently, the opinion fails to establish or even imply that its statutory determination provides an alternate basis for its judgment.[5/]

5/ Cf. Michigan v. Long, 103 S. Ct. 3469, 3476 (1983) (decision does not rest upon an adequate and independent state

(footnote continued)

A fair reading of the notice and hearing provision also supports the Department's view that there is no independent statutory basis for the opinions of the lower courts. The language of § 2020(e)(10) does not link the statutory standard for adequate notice with the constitutional standard. Nevertheless, the legislative history makes the necessary connection and supports the lower courts' interweaving of the statutory and constitutional issues involved here. The House Report on the 1977 amendments to the Food Stamp Act states that Congress enacted the notice and

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(footnote continued)

ground where it "fairly appears to rest primarily upon federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion").

hearing provision of the Act to comply with the constitutional requirements set forth in Goldberg v. Kelly, 397 U.S. 254 (1970):

> Under the Food Stamp Act of 1964, as amended by the 1970-1971 amendments, each state agency must . . . provide "for the granting of a fair hearing and the prompt determination thereafter to any household aggrieved by the action of a State agency. . . . This change in legislation came about in response to a Supreme Court decision, Goldberg v. Kelly, 397 U.S. 254 (1970), which ruled that when a welfare recipient's benefits are terminated by administrative action, the recipient has a constitutional right to an evidentiary hearing to contest the termination. H.R. Rep. 95-464, 95th Cong., 1st Sess. 285-86, reprinted in 1977 U.S. Code Cong. & Ad. News 2220-22.

As the legislative history makes clear, the notice and hearing provision was added to the Act to ensure that the basic due process requirement of a hearing, as outlined in Goldberg v. Kelly, was incorporated into the Program.

In short, because the statutory and constitutional issues are totally interrelated in both the legislative history and the reasoning of the Court of Appeals, and because there is no indication by the Court of Appeals that its reference to the statute provides an independent ground for its decision, there is no adequate basis for the decision below to be affirmed without reaching the questions presented in the Commissioner's petition.

B. The Food Stamp Act Does Not Mandate The Form And Content Of Notices Announcing A Legislative Change in Benefits.

Even if the statutory basis for invalidating the December notice could stand on its own as an independent basis for the actions below, the statutory issues were wrongly decided and should

be reversed. The Court of Appeals based its statutory conclusion not on the plain language of the Act or its history, but rather on its belief that Congress could not have intended the enactment of a notice provision which "violated" the constitutional standards it was announcing for the first time.

Certainly, the plain language of § 2020(e)(10) does not support the conclusion that a mass change notice must contain recipient-specific information or must not be written above a particular reading level. The words "individual notice" are merely used to trigger the household's duty to timely request a hearing in order to continue to receive the higher benefit amount.[6/] The

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6/ The relevant notice language upon which Parker relies states: "Provided,

(footnote continued)

section neither defines individual notice nor mandates the form and content of that notice.7/ At bottom, § 2020(e)(10) is a fair hearing provision which permits the freezing of benefits if a hearing

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(footnote continued)

That any household which timely requests such a fair hearing after receiving individual notice of agency action . . . shall continue . . . to receive benefits . . ." 7 U.S.C. § 2020(e)(10).

7/ The congressional intent to leave the details of a § 2020(e)(10) notice to the Secretary and each state is further evidenced by contrasting the general language of § 2020(e)(10) with the more specific requirements included in other sections of the Act. For example, the monthly reports required by certain households must contain "a description, in understandable terms in prominent and bold face lettering, of the appropriate civil and criminal provisions dealing with violations of this chapter including the prescribed penalties." 7 U.S.C. § 2015(c)(3). See also 7 U.S.C. § 2020(e)(2) (requirements for uniform application form); 7 U.S.C. § 2016(c) (requirements for coupon design).

has been timely requested. The statute prescribes no particular form or content for notices in individual fair hearing situations, and is concerned with matters quite remote from the dynamics of a mass change, as the Secretary's implementing regulations reflect.[8/]

The Secretary interprets the notice and fair hearing provision of § 2020(e)(10) to apply only to administrative actions based upon a change in an individual's particular circumstances,

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8/ Parker claims that Congress intended a detailed notice be issued so that a household can detect and bring to the agency's attention any underlying inaccuracies in the household's file which may contribute to an erroneous payment. Nothing in the legislative history articulates such a rationale. Instead, Congress has explicitly chosen to deal with inaccurate household data by instituting a periodic reporting requirement for certain households. See 7 U.S.C. § 2015(c). Congress' choice as to the best way to deal with the problem should not be displaced.

as the situation addressed in Goldberg v. Kelly. From the beginning, the Secretary has consistently interpreted the notice and hearing provision of § 2020(e)(10) not to apply to legislative changes nor to mandate particular wording, content, or format of notices. The implementation of the § 2020(e)(10) notice and fair hearing requirements is set out in the "notice of adverse action" regulations, 7 C.F.R. § 273.13, and fair hearing regulations, 7 C.F.R. § 273.15, which were first promulgated in 1971 following Goldberg v. Kelly. See 36 Fed. Reg. 20145 (October 16, 1971). Under the Secretary's regulations, a state must mail an "adequate" notice at least ten days prior to the proposed administrative action to terminate or reduce a particular household's benefits. By contrast,

when the state implements the type of legislative change which gave rise to this lawsuit, it is specifically exempted from this requirement for notice of adverse action. 7 C.F.R. § 273.13(b)(1). The Secretary's regulations do not prescribe the format and content of either an adverse action or mass change notice.[9/]

9/ At the time this action arose, the Secretary mandated the content of the adverse action notice and required prior approval of the form of the notice. The Secretary has eliminated his approval of the notice of adverse action as well as specific requirements for its content and format in order to conform with § 166 of the 1982 Food Stamp Act amendments, Pub. L. No. 97-253, 96 Stat. 763, 779, which provides for increased state agency flexibility for all forms and notices except the Application Form. 48 Fed. Reg. 6313, 6314 (February 11, 1983). Thus, at the same time the Congress determined that there should be less federal specification of the form and content of food stamp notices, the courts below were imposing specifications which went beyond those requirements which Congress deemed appropriate.

The Secretary's contemporaneous and consistent construction of the Act's notice and fair hearing provision is entitled to deference by this Court in view of his broad authority to administer a complex program such as the Food Stamp Program. See Aluminum Co. of America v. Central Lincoln Peoples' Utility District, 104 S. Ct. 2472, 2479-80 (1984); see also Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981). Further, Congress has recognized the Secretary's regulatory distinction between notices of adverse action and mass change notices and has permitted that distinction to stand.[10/]

10/ The House Report on the 1977 amendments that added the notice language upon which Parker relies states: "The Committee bill would retain the fair hearings provision of the law intact and would encourage the Department to enforce its excellent regulations and instructions on the subject. . . . The Department

(footnote continued)

Accordingly, there is no support whatsoever in the language, history, or purpose of the Food Stamp Act for the conclusion that the December notice was statutorily defective simply because it did not contain particularized factual data for each household and because it contained words "deemed unfamiliar" to some households. Just as the Due Process Clause does not mandate the form and con-

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(footnote continued)

should also be certain that, although its regulations do not require individual notice of adverse action when mass changes in program benefits are proposed, they should require the states to send precisely such notices well in advance when the massive changes mandated by this bill are to be implemented. . . . All states should be overseen to be certain that their individual notices in non-mass change adverse action contexts recite the household's fair hearing request rights and the availability of free legal representation, if any. . . ." H.R. Rep. 95-464, 95th Cong., 1st Sess. 289 reprinted in 1977 U.S. Code Cong. & Ad. News 2224-25.

tent of a notice neither does the Food Stamp Act.

C. While The Court May Properly Consider Whatever Statutory Issue Exists In This Case, Review Of The Constitutional Question Is Unavoidable.

The Commissioner's petition seeks reversal of the Court of Appeals judgment declaring the December notice invalid. The challenged judgment is based principally on constitutional, not statutory, grounds. As discussed above, the statutory determination is merely an appendage to the more comprehensive constitutional analysis and is dependent upon and subsumed within the issue presented by the Commissioner's petition. Therefore, the question of the validity of the statutory holding is fairly included within the constitutional question presented and

thus properly before this Court. See Supreme Court Rule 15.1(a)("The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein."). For example, in Arkansas Electric Co-op. Corp. v. Arkansas Public Commission, 103 S. Ct. 1905, 1911-12 n.6 (1983), the jurisdictional statement raised only a Commerce Clause issue; nevertheless, as a separate ground for reversal, the Court considered the statutory pre-emption issue which it determined to be fairly included within the constitutional question presented because of the close relationship between the legislative and judicial enforcement of the Commerce Clause. In this case, there is a similar congruence of judicial and legislative enforcement of the Due Process Clause, as the notice provision

relied upon found its genesis in Goldberg v. Kelly.[11]

Moreover, the remedy questions raised in Parker's petition place the statutory issue squarely before the Court as well.[12] Parker states, for example, "[i]n order to evaluate the propriety of the remedy afforded, it is necessary to

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11/ See also United States v. Arnold, Schwinn & Co., 388 U.S. 365, 371-72 n.4 (1967); Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 94 n.9 (1982); Vance v. Terrazas, 444 U.S. 252, 258-59 n.5 (1980).

12/ Parker presents the following questions in his petition: "2. Did the Court of Appeals for the First Circuit violate the command of the Food Stamp Act by refusing to permit the restoration of benefits withheld without the prior, adequate notice required by the Act?"; "3. By reversing both the award of prospective injunctive relief and the restoration of wrongfully withheld benefits, did the Court of Appeals for the First Circuit render meaningless the plaintiffs' statutory right to prior, adequate notice?".

examine the context and purpose of the statutory provision that has been violated." Brief at 2. He asks the Court to rule that the award of retroactive benefits was proper because the notice and hearing provision, 7 U.S.C. § 2020(e)(10), provides households with a substantive entitlement to food stamps until a recipient-specific notice is received. Brief at 38-39. Thus, the question of what § 2020(e)(10) requires is also fairly included within the questions raised by Parker's petition. Likewise, since the Court of Appeals premised whatever remedy it was willing to order on the existence of constitutional violations, the propriety of the remedy implicates the nature - constitutional or statutory - of the violation. Milliken

v. Bradley, 433 U.S. 267, 280-81 (1977).[13/]

Review of the statutory determination alone, however, will not dispose of this case. The Court of Appeals held that the Due Process Clause of the Fourteenth Amendment mandates that notices announcing across-the-board legislative changes in the Food Stamp Program must contain

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13/ Even if the questions raised by both petitions cannot be said to fairly comprise the statutory issue, the Court is not without the power to review the lower court's statutory determination if deemed to be controlling. Procunier v. Navarette, 434 U.S. 555, 559-60 n.6 (1978); Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. at 94 n.9. The Court has exercised this power where, as here, the court below has considered the issue and the parties have fully briefed it. United States v. Arnold, Schwinn & Co., 388 U.S. at 371 n.4; Blonder-Tongue v. University Foundation, 402 U.S. 313, 320-21 n.6 (1971). Cf. Escambia County, Florida v. McMillan, 104 S. Ct. 1577, 1579 (1984) (per curiam)(where Court of Appeals did not decide statutory issue and the parties did not brief it before the Supreme Court, case was remanded).

the precise effect of the legislative change for each household and enough factual data from the household's case file to enable it to determine from the face of the notice whether the agency has made an error in computing its benefits. PA. 21, 24, 100, 102-03.

Parker invokes the Court's preference for avoiding constitutional questions in cases which can be decided on statutory grounds. The Court of Appeals is familiar with that preference and has invoked it in its own adjudications.[14/] The Court must have therefore determined that the appeal below could not be decided without reaching the due process question. See Hutchinson v. Proxmire, 443

14/ See, e.g., Catrone v. Massachusetts State Racing Commission, 535 F.2d 669, 671 (1st Cir. 1976).

U.S. 111, 123 (1979).[15]

Further, this case presents issues which are of continuing urgency not only in Massachusetts but throughout the Nation. The Court of Appeals decision has immediate, significant impact on the administration of many grant programs. Rather than simply judging the December notice to be inadequate, the courts below announced constitutional requirements for all mass change notices issued under the Food Stamp Progam.[16] Since the

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15/ If the Court were not to reach the constitutional question, as Parker argues, then it can not reach the remedy issues. The Court of Appeals determined the appropriate remedy based upon the constitutional finding of an inadequate notice. See PA. 34-37.

16/ The Court of Appeals is not the only federal court to decide a notice case such as this on constitutional grounds. See, e.g., Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied 420 U.S. 1008 (1975); Willis v. Lascaris, 499 F. Supp. 749 (N.D. N.Y. 1980).

Food Stamp Program is a federal program and mass changes can and do occur regularly review by the Court is necessary.[17] For the reasons set forth in the Commissioner's earlier brief, the Court of Appeals decision should be reversed.

II. THE COURT OF APPEALS PROPERLY RULED THAT THE FOOD STAMP ACT ONLY AUTHORIZES AN AWARD OF RETROACTIVE BENEFITS WHERE THERE HAS BEEN AN ERRONEOUS ALLOTMENT.

Only if this Court disagrees with the Commissioner and the Secretary and determines that the December notice did not adequately inform households of the legislative change in the earned income deduction, is it necessary to reach the

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17/ Legislative and regulatory changes in the Food Stamp Program as well as changes or adjustments (such as a cost-of-living adjustment) in other public benefit programs frequently require changes in food stamp benefits.

remedy issues raised by Parker.

Although the District Court did not find that any household failed to receive all the food stamp benefits to which it was entitled, it nonetheless awarded retroactive benefits to the entire class of 16,000 households. The Court of Appeals reversed this award of unwarranted, sweeping relief and instead ordered the Department to review each household's file and provide retroactive benefits, but only to those households that may have received an incorrect benefit amount.[18/] The Commissioner believes

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18/ Since the legislative change simply required a computer recalculation of each household's benefits using financial data already on file, the risk of an error in benefits, attributable to the implementation of this reduction, was minimal. The Court of Appeals acknowledged "the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated." PA. 33.

that the Court of Appeals was correct because the remedy imposed by the District Court was inconsistent with the Food Stamp Act and the constitutional requirement that a remedy must be confined to the wrong.[19/]

Two sections of the Food Stamp Act allow for restoration of benefits. Section 2020(e)(11) provides that upon receipt of a request from a household, benefits which have been "wrongfully denied or terminated" shall be restored.

19/ Parker relies upon the statute to support his remedy arguments; yet, it is the constitutional finding of an inadequate notice upon which the remedy decision is based. See PA. 34-37. The Court of Appeals decision properly recognizes that a remedy must be related to "the condition alleged to offend the constitution," and should be "designed as nearly as possible to restore the victims . . . to the position they would have occupied in the absence of such conduct." Milliken v. Bradley, 433 U.S. 267, 280 (1977) (citations and quotations omitted); Dayton Board of Education v. Brinkman, 433 U.S. 406, 417 (1977).

Section 2023(b), which was added in 1981,[20] states that "[i]n any judicial action arising under this chapter, any food stamp allotments found to have been wrongfully withheld shall be restored . . . ."

It is apparently Parker's view that if a state agency does not issue an adequate notice, then it automatically follows that benefits have been "wrongfully denied" or "wrongfully withheld" and must be restored regardless whether the household in fact received the correct amount of benefits. Parker also argues that § 2020(e)(10), which allows benefits to be frozen until an appeal is heard, provides a substantive entitlement to benefits until an adequate notice is issued.

20/ Pub. L. No. 97-98, § 1320, 95 Stat. 1282, 1286.

The Commissioner disagrees. A household's substantive interest is in having its food stamp benefits properly calculated and issued, not in receiving a particular form of notice or procedure.[21] Parker's argument also ignores the fact that benefits are frozen only until the appeal is decided. If the household does not prevail at the appeal it is required to return the overpayments it received while the appeal was pending. See 7 C.F.R. § 273.15(k).

21/ See, e.g., Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983); Codd v. Velger, 429 U.S. 624, 627 (1977)(per curiam); see also Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974)(due process protects substantial rights, it does not guarantee a particular form of procedure). Cf. Chapman v. California, 386 U.S. 18, 22 (1967)("there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless").

Parker's expansive interpretation of the Act's restoration provisions cannot be squared with the congressional intent and purpose behind these provisions and the Act as a whole.[22/] The proper reading of the restoration provision allows for restoration of benefits only to those households that experienced a denial or withholding of benefits which, under the rules governing eligibility for and calculation of benefits, they should have received. In Parker's view, even if Congress determines by statute that all food stamp households should receive 5% less in benefits, a particular household whose benefits are correctly reduced by 5% is entitled to restoration of the benefits if the notice of the re-

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22/ The terms "wrongfully denied" or "wrongfully withheld" are neither defined nor explained in the Act.

duction contains some procedural flaw. But there is no logic which supports the view that Congress intended that its control over food stamp expenditures could be thwarted by state officials issuing defective notices of mass changes, particularly in light of the congressional and secretarial determinations that the form and content of mass change notices be left to the states. See Pub. L. No. 97-253, § 166; see also 7 C.F.R. § 273.12(e).[23/]

23/ Parker also erroneously views the restoration provision as a private enforcement mechanism for all the procedural requirements of the program. There is absolutely no support for this claim. The notice and fair hearing provision is part of the overall state plan requirements. Congress has given the Secretary, not private litigants, express authority to ensure compliance with these provisions as well as the state plan as a whole by withholding funds from the state and by an injunction. 7 U.S.C. § 2020(g). Of course, those households

(footnote continued)

The legislative history of the restoration of benefits provision also supports the common sense interpretation that only substantive entitlements to food stamps were protected. The restoration of benefits provision was added by the Food Stamp Act of 1977, Pub. L. No. 95-113, § 1301, 91 Stat. 958, 972 (1977).[24/] The House Report, consistent with the Commissioner's and the Secretary's interpretation, refers only to errors in determining eligibility for

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(footnote continued)

that have suffered an actual injury, that is, ultimately received less benefits than they were entitled to receive under the program rules, can make a claim under § 2020(e)(11). No such plaintiff is now before the Court. See PA. 53-54, 56; JA. 132-33, 139, 151; P. Exh. 12, 13, C.A. App. II, 25, 28.

24/ Prior to the enactment of this provision, the Secretary's regulations allowed for restoration of lost benefits. See 7 C.F.R. § 271.1 (1976); 41 Fed. Reg. 11464 (March 19, 1976).

or amounts of benefits: "Thus, if a household lost benefits because it was found to be ineligible when it was eligible or because its allotment was not as high as it should have been such benefits would be recouped in the form of allotment add-ons."[25/] No mention is made of "wrongful denials" resulting from inadequate notice where the underlying substantive decision is correct. Instead, the House Report explained that the Secretary's previously promulgated restoration of benefits regulation was a direct result of a 1972 federal court decision, Bermudez v. United States Department of Agriculture, [26/] which required retro-

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25/ H.R. Rep. No. 95-464, 95th Cong., 1st Sess. 284-85, reprinted in 1977 U.S. Code Cong. & Ad. News 2220.

26/ 348 F. Supp. 1279 (D.D.C. 1972), aff'd, 490 F.2d 718 (D.C. Cir. 1973),

(footnote continued)

active benefits for those households where benefits had been "wrongfully withheld." The nature of the wrongful withholding in Bermudez was the erroneous withholding of benefits to which the household was otherwise entitled. For example, one eligible recipient because of an administrative error did not receive any benefits for ten months; another receipient, because of agency error had her benefits terminated.

Unlike the circumstances addressed by Bermudez and the resulting regulations, there has been no showing in this case that any household received an incorrect allotment of food stamps. If

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cert. denied, 414 U.S. 1104 (1974). See H.R. Rep. 95-464, 95th Cong., 1st Sess. 283 reprinted in 1977 U.S. Code Cong. & Ad. News 2219. See also 39 Fed. Reg. 35177, 35178 (September 30, 1974).

there are any such households, the Court of Appeals decision provides for them. To provide all 16,000 households, however, with retroactive benefits is not to restore statutorily conferred benefits that have been wrongfully denied, but to provide a windfall not contemplated by the Food Stamp Act. It would do so at the federal taxpayers' expense.[27/]

27/ Though the Court need not go so far in this case to dispose of Parker's contentions, the Commissioner notes that decisions of this and other courts would support the proposition that even where a household has actually been denied the correct benefit level, an award of retroactive benefits more than two years after the wrongful denial is not remedial. Edelman v. Jordan, 415 U.S. 651, 666 n.11 (1974) (quoting Rothstein v. Wyman, 467 F.2d 226, 235 (2nd Cir. 1972))("As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear.").

(footnote continued)

The award of retroactive benefits to households that had received the correct allotment either initially or after an appeal would indeed increase the total program costs, a result entirely inconsistent with congressional intent.28/ The containment of costs has been the primary purpose of the various amendments to the Food Stamp Act of 1964. The 1977 amendments, for example, involved tight-

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(footnote continued)

Two circuits have followed this reasoning to bar retroactive food stamp benefits even where households received a benefit amount less than that to which they were entitled. See Klaips v. Bergland, 715 F.2d 477, 484-485 (10th Cir. 1983); Colbeth v. Wilson, 554 F. Supp. 539, 546 (D. Vt. 1982), aff'd, sub nom. 707 F.2d 57 (2nd Cir. 1983).

28/ In requiring the benefits to be restored, the court in Bermudez noted that the retroactive benefits "do not add to the budgeted expense of operating the program. It is merely expense which through error is delayed in its final payment." Bermudez, 490 F.2d at 723.

ening program administration, eliminating the non-needy from the program, and holding program costs close to then-current program levels.29/

Lowering the earned income deduction by 2%, which prompted the mass change notice in this case, was part of the general effort to reduce the growth of Food Stamp Program expenditures "by restricting eligiblity for the Program and reducing benefits for certain households which remain eligible." 46 Fed. Reg. 44712 (September 4, 1981). Yet, the District Court's order did what Congress specifically required states not to do; that

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29/ See H.R. Rep. No. 95-464, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. Code Cong. & Ad. News 1978. The 1981 amendments were part of the 1981 Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 357 (1981), the sole purpose of which was to reduce federal spending. See S. Rep. No. 97-139, 97th Cong., 1st Sess. 2-3, reprinted in 1981 U.S. Code Cong. & Ad. News 397-98.

is, it required the Department to compute eligible recipients' benefits based upon a 20% rather than 18% earned income deduction. Thus, the order which Parker seeks to reinstate not only counters the unmistakable intent of Congress, but also ignores the admonition of this Court that it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." Schweiker v. Hansen, 450 U.S. 785, 788 (1981) (per curiam), (quoting Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947)).

The Court of Appeals decision, on the other hand, is entirely consistent with the purpose of the Food Stamp Act. Under its formulation, retroactive benefits are extended only to those households that received an erroneous allotment. The Court of Appeals reversed the

award for only those households whose benefits were correctly computed in accordance with the dictates of Congress using the 18%, rather than the 20%, earned income deduction. Neither the Food Stamp Act, decisions of this Court, nor considerations of equity require more than this.

III. THE COURT OF APPEALS CORRECTLY SET ASIDE THE UNNECESSARY AND OVERLY INTRUSIVE MANDATORY INJUNCTION.

In addition to the award of retroactive benefits, the District Court issued a two-part mandatory permanent injunction. First, the District Court prescribed the content of all future food stamp notices;[30/] second, it ordered

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30/ Although a mass change notice was challenged in this case, the District Court injunction covered all notices issued under the Food Stamp Program.

the Commissioner to draft regulations, subject to the court's approval, with legibility and comprehensibility standards for future notices. PA. 102-04.[31/]

The Court of Appeals correctly reversed this injunction because it "placed an improper and unnecessary burden upon the Department. . . ." PA. 38. Although the District Court has discretion to fashion an appropriate remedy, the exer-

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31/ The District Court heard evidence offered by plaintiffs concerning typeface, size of type, capitalization, the frequency of multisyllabic words, the reading level of the average food stamp recipient, and similar matters. On this evidence the District Court concluded that the Due Process Clause requires mass change notices to be printed no smaller than eight-point type, with a mixture of upper and lower case letters, and written for a person with a fifth-to-sixth grade reading capacity. Presumably, the District Court intended that the state regulations it ordered contain a minimum reading level and specific typographical requirements for future food stamp notices.

cise of that discretion is not unguided by meaningful standards or shielded from thorough appellate review. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975). The scope of any such relief must be consistent with the intent of the Food Stamp Act and must be appropriate to the circumstances of the case. The District Court injunction was not.

The Food Stamp Program is funded by the federal government, but is largely administered by the states. 7 U.S.C. § 2020. The states are required to administer the program in a manner consistent with federal law and regulations promulgated by the Secretary, 7 U.S.C. §§ 2013(c), 2025(b)(1), and certain aspects of the administration of the program are explicated in great detail by federal regulations. E.g., 7 C.F.R. § 273.9(a) (eligibility criteria and

benefit levels which states must adhere to); 7 U.S.C. § 2014(c) and 7 C.F.R. § 274.9(d) (explicit prescription of method for computing household income for eligibility purposes).

In contrast to these explicit federal requirements, the federal statutory and regulatory scheme governing the issuance of mass change notices is silent as to the form and content of such notices. Thus, while the states must certainly draft and issue notices which meet the minimum requirements of due process, the precise contours of the states' adherence to constitutional principles is left to the states. Rosado v. Wyman, 397 U.S. 397, 408-409 (1970) (the details of implementing federal law in the area of public assistance, when not explicitly laid out by federal statute or regulation, are left to the states). Cf.

Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 208 (1982) (in analogous federal scheme, "questions of methodology are for resolution by the states.").[32/]

The District Court's intrusion on the Secretary's and the state's implementation prerogatives is inconsistent with congressional intent to leave the administration of the program and the imposition of specific federal notice requirements to the Secretary and each participating state. The development of notices that comply with complex program rules and are useful to both the agency and

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32/ Recent amendments to the Food Stamp Act allowing states even more flexibility to draft and issue forms and notices clearly show Congress' intent to leave the form and content of notices to the states. Pub. L. No. 97-253, § 166, 96 Stat. 763, 779. See S. Rep. No. 97-504, 97th Cong., 2nd Sess. 92-93 reprinted in 1982 U.S. Code Cong. & Ad. News 1730-33.

household is a continuing process which is better suited to the legislative and administrative arena rather than the federal courts. Cf. Heckler v. Day, 104 S. Ct. 2249, 2258 (1984) ("In light of the unmistakable intention of Congress, it would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines with respect to future disability claims.")

The Court of Appeals decision also properly reflects the well-accepted principle that an injunction should not be granted except in the most extraordinary circumstances. See Rizzo v. Goode, 423 U.S. 362, 379 (1976). It saw no reason to depart from thisCourt's teaching that, in cases involving a government defendant, a declaration is normally sufficient to ensure future conduct. Doran

v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("[A] district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary."). Finally, the Court of Appeals found insufficient proof that the state defendant would continue to engage in the proscribed conduct, and so determined that an injunction was unwarranted. Poe v. Gerstein, 417 U.S. 281 (1974) (per curiam); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 584 (1971).

The District Court's declaration that the challenged food stamp notice did not meet due process requirements was sufficient. The permanent injunction as to the content, legibility, and comprehensibility of all future notices of reduc-

tion would threaten the Commissioner with contempt sanctions whenever congressional action modifying the Food Stamp Program caused him to communicate with food stamp recipients and the adequacy of any future food stamp notice was inevitably drawn into question. The circumstances of this case fall far short of what is necessary to justify such a drastic remedy.

It was undisputed at trial that the challenged notice of reduction, with respect to its type-size and wording, was not the Department's typical food stamp mass change notice.[33/] There was no showing that the Department planned to issue other notices with similiar type

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33/ The notice was in two parts; the first part explained the statutory change in the earned income deduction and appears in its entirety in the Court of Appeals decision, PA. 4; the second part provided the explanation of the temporary restraining order. Id.

and wording. Indeed, such a showing would have been a virtual impossibility; part of the difficulty with the challenged notice stemmed from its attempt to provide a thorough explanation of the effect of the District Court's temporary restraining order on the households' previous benefit reductions and appeal rights. This attempt was, in turn, thought necessary because the District Court had enjoined the notices originally issued the previous month and ordered restoration of benefits. In the event the court's declaration of rights survives this Court's review, such a set of circumstances is hardly likely to recur.

Furthermore, with respect to the lack of recipient-specific data, the District Court found that the Department currently includes in all mass change notices under the Food Stamp Program each household's

old and new benefit amount. PA. 49.[34/] The Department's voluntary inclusion of certain recipient-specific data in current mass change food stamp notices is a relevant factor as to whether it was necessary for the District Court to order such extraordinary relief. E.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982).[35/]

34/ The Court of Appeals also acknowledged "that the state supplied adequate notice in a very similiar situation involving statutory reductions in the . . . AFDC . . . program. LeBeau v. Spirito, 703 F.2d 639 (1st Cir. 1983)." PA. 38.

35/ Parker attaches to his brief a food stamp notice of reduction due to a social security cost-of-living increase issued this past March which is, of course, not part of the record in this case. Appendix C. He claims that the Commissioner's failure to include underlying factual data underscores the need to place the Commissioner's issuance of notices under court supervision to prevent erroneous calculation or termination of benefits. Parker has refused to provide the Commis-

(footnote continued)

Parker believes that the Court of Appeals acted improperly because it relied to some extent upon the Department's good faith and such reliance was at odds with this Court's recent decision in Pennhurst v. Halderman, 104 S. Ct. 900 (1984). Pennhurst held that a federal court lacks the power to award injunctive relief against state officials on the basis of state law. The plaintiffs rely not on this holding but on a footnote stating that a finding of good faith, and therefore immunity from damages,

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(footnote continued)

sioner with sufficient information, even under confidentiality arrangements, to determine whether the individual who received that notice was in fact erroneously deprived of benefits. Even so, Parker ignores the fact that the format and language of the notice is quite different from the challenged notice and, even under his view of notices, is vastly improved.

"does not affect whether an injunction might be issued . . . by a court possessed of jurisdiction." Id. at 912 n.17 (emphasis added). The Court of Appeals decision is entirely consistent with the accepted principle articulated in that footnote. The District Court injunction was not set aside simply because the Department demonstrated a lack of bad faith. Rather, the Court of Appeals considered the Department's lack of bad faith as one of the several factors outlined above in order to assess whether, under the facts and circumstances of this case, a prospective mandatory injunction was necessary.

The Court of Appeals properly exercised its appellate role in reversing the extraordinary permanent injunction entered by the District Court. The injunction was inconsistent with the con-

gressional intent to allow the Secretary and the states to fill in the details of the complex Food Stamp Program. It was burdensome and simply unnecessary in view of the declaration that was issued, and in view of the unique circumstances which gave rise to the December notice. Finally, the order that the state promulgate regulations, subject to court approval, was an unwarranted and unnecessary intrusion into the state's and the Secretary's administration of the Food Stamp Program.

CONCLUSION

For the foregoing reasons and those in the Commissioner's previously filed brief in support of his petition, the Commissioner of Public Welfare requests that the Court of Appeals decision be reversed. Should this Court affirm the

Court of Appeals on the merits, however, and reach the remedy issues raised by Parker's petition, the Court of Appeals decision as to the appropriate remedy should be affirmed.

Respectfully submitted,

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